(4)

No. 98-85

FILED
NOV 10 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1998

JAMES B. HUNT, JR., *et al.*,

Appellants,

and

ALFRED SMALLWOOD, *et al.*,

Appellant-Intervenors,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

BRIEF OF APPELLANT-INTERVENORS

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
VICTOR A. BOLDEN
DEBORAH N. ARCHER
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, New York 10013
(212) 219-1900

ADAM STEIN
FERGUSON, STEIN, WALLAS,
ADKINS GRESHAM &
SUMTER, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Appellant-Intervenors

54pp

QUESTIONS PRESENTED

1. In a racial gerrymandering case, is an inference drawn from the challenged district's shape and racial demographics, standing alone, sufficient to support summary judgment for the plaintiffs on the contested issue of the predominance of racial motives in the district's design, when it is directly contradicted by the affidavits of the legislators who drew the district?

2. Does a final judgment from a court of competent jurisdiction, which finds a state's proposed congressional redistricting plan does not violate the constitutional rights of the named plaintiffs and authorizes the state to proceed with elections under it, preclude a later constitutional challenge to the same plan in a separate action brought by those plaintiffs and their privies?

3. Is a state congressional district subject to strict scrutiny under the Equal Protection Clause simply because it is slightly irregular in shape and contains a higher concentration of minority voters than its neighbors, when it is not a majority-minority district, it complies with all of the race neutral districting criteria the state purported to be following in designing the plan, and there is not *direct* evidence that race was the predominant factor in its design?

PARTIES TO THE PROCEEDINGS

Actual parties to the proceeding in the United States District Court were:

(1) James B. Hunt, Jr., in his capacity as Governor of the State of North Carolina, Dennis Wicker in his official capacity as Lieutenant Governor of the State of North Carolina, Harold Brubaker in his official capacity as Speaker of the North Carolina House of Representatives, Elaine Marshall in her official capacity as Secretary of the State of North Carolina, and Larry Leake, S. Katherine Burnette, Faiger Blackwell, Dorothy Presser and June Youngblood in their capacity as the North Carolina State Board of Elections, defendants, appellants herein,

(2) Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins, defendant-intervenors, appellant-intervenors herein,

(3) Martin Cromartie, Thomas Chandler Muse, R.O. Everett, J.H. Froelich, James Ronald Linville, Susan Hardaway, Robert Weaver and Joel K. Bourne, plaintiffs, appellees herein.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceedings ii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

A. Events leading to Adoption of the 1997 Remedial Plan 2

B. The 1997 Remedial Plan 6

C. The Legal Challenge to the 1997 Remedial Plan 10

Summary of Argument 15

ARGUMENT –

I. Summary Judgment was Inappropriate in this Case 17

TABLE OF CONTENTS (continued)

Page

ARGUMENT (continued)

A. Because this case involves an inquiry into the intent of the North Carolina legislature, it should not have been resolved through summary judgment 17

B. Because this case necessarily concerns issues arising under the Voting Rights Act, it should not have been resolved through summary judgment 23

II The District Court Erred in Ruling That Race Was the Predominant Factor in the Creation of the Twelfth Congressional District 27

A. The court erred in sanctioning the Appellees' argument that race predominated in the development of the 1997 Remedial Plan because that plan did not evidence legislature's complete abandonment of the 1992 plan as a starting point for fashioning the remedy 27

TABLE OF CONTENTS (continued)

Page

ARGUMENT (continued)

B. In jurisdictions such as North Carolina, with a history of prior discrimination and minority vote dilution, and in which voting patterns remain racially polarized, districting must be sufficiently race-conscious to avoid violating Section 2 of the Voting Rights Act, but that circumstance does not establish that race "predominates" so as to trigger "strict scrutiny" 32

III Even if Race Predominated in its Creation, the District Court Erred in Never Determining if the State had a Compelling Justification for Creating a Narrowly Tailored District 12 40

Conclusion 42

TABLE OF AUTHORITIES

CASES

Page

Abrams v. Johnson,
521 U.S. 74 (1997) 36

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 18

Bronze Shields, Inc. v. New Jersey Department of Civil Service, 667 F.2d 1074 (3d Cir. 1981), *cert. denied*, 458 U.S. 1152 (1982) 18

Burns v. Richardson,
384 U.S. 73 (1966) 29

Bush v. Vera,
517 U.S. 952 (1996) ..... *passim*

City of Rome v. United States,
450 F. Supp. 378 (D.D.C. 1978) 26

Clark v. Calhoun County,
88 F. 3d. 1393 (5th Cir. 1996) 38

County Council v. United States,
555 F. Supp.694 (D.D.C. 1983) 26

CASES (continued)

Page

DeWitt v. Wilson,
856 F. Supp. 1409 (E.D. Cal. 1994),
aff'd, 515 U.S. 1170 (1995) 37

Gingles v. Edmisten,
590 F. Supp. 345 (E.D.N.C. 1984),
aff'd in part and rev'd in part, sub. nom.,
Thornburg v. Gingles, 478 U.S. 30 (1986) .. *passim*

Growe v. Emison,
507 U.S. 25 (1993) 29

Jeffers v. Clinton,
839 F. Supp. 612 (E.D. Ark. 1993) 23

Johnson v. DeSoto County Board of Commissioners,
868 F. Supp. 1376 (M.D. Fla. 1994) 24

Johnson v. Miller,
864 F. Supp. 1354 (S.D. Ga. 1994),
aff'd, 515 U.S. 900 (1995) 19, 20

King v. State Board of Elections,
___ U.S. ___, 118 S. Ct. 877 (1998) 36

Lawyer v. Department of Justice,
521 U.S. 567 (1997) ..... *passim*

Lipsett v. University of Puerto Rico,
864 F.2d 881 (1st Cir. 1988) 18

CASES (continued)

Page

Mallory v. Eyrich,
707 F. Supp. 947 (S.D. Ohio 1994) 24

McDaniel v. Sanchez,
452 U.S. 130 (1981) 30

McGhee v. Granville County,
860 F.2d 110 (4th Cir. 1988) 29

Miller v. Johnson,
515 U.S. 900 (1995) ..... *passim*

Poller v. Columbia Broadcasting System, Inc.,
368 U.S. 464 (1962) 18

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 18

Ross v. Communications Satellite Corp.,
759 F.2d 355 (4th Cir. 1985) 19

Scott v. United States,
920 F. Supp. 1248 (M.D. Fla. 1996),
aff'd sub. nom., Lawyer v. Department of Justice, 521 U.S. 567 (1997) 38

Shaw v. Hunt,
517 U.S. 899 (1996) ..... *passim*

CASES (continued)

Page

Shaw v. Hunt,
No. 92-202-CIV-5-BR (E.D.N.C. September 12, 1997) 9

Shaw v. Hunt,
861 F. Supp. 408 (E.D.N.C. 1994),
rev'd, 517 U.S. 899 (1996) 1

Shaw v. Reno,
509 U.S. 630 (1993) ..... *passim*

Shaw v. Reno,
808 F. Supp. 461 (E.D.N.C. 1992) 1

Smith v. Beasley,
946 F. Supp. 1174 (D.S.C. 1996) 21, 25

Smith v. University of North Carolina,
632 F.2d 316 (4th Cir. 1980) 18

Stepanischen v. Merchants Despatch Transportation Corp., 722 F.2d 922 (1st Cir. 1983) 18

Tallahassee Branch of NAACP v. Leon County,
827 F.2d 1436 (11th Cir. 1987) 29

Thornburg v. Gingles,
478 U.S. 30 (1986) 23, 37

CASES (continued)

Page

United States v. Hayes,
515 U.S. 737 (1995) 33

Upham v. Seamon,
456 U.S. 37 (1982) 30

Vera v. Richards,
861 F. Supp. 1304 (S.D. Tex. 1994),
aff'd sub. nom., Bush v. Vera,
517 U.S. 952 (1996) ..... *passim*

Voinovich v. Quilter,
507 U.S. 146 (1993) 29

White v. Weiser,
412 U.S. 783 (1973) 29, 30

Wilson v. Eu,
1 Cal. 4th 707, 823 P.2d 545,
4 Cal. Rptr.2d 379 (1992) 37

Wise v. Lipscomb,
437 U.S. 535 (1978) 29

STATUTES & RULES

28 U.S.C. § 1253 2

42 U.S.C. § 1973 ..... 23, 32

STATUTES & RULES (continued)

Page

42 U.S.C. § 1973c 9

1997 N.C. Sess. Laws, Ch. 11 1

Fed. R. Civ. P. 56 2

OTHER AUTHORITIES

10B Charles A. Wright, Arthur R. Miller, &
Mary K. Kane, Federal Practice
and Procedure (1998 ed.) 19

BRIEF OF APPELLANT-INTERVENORS

Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins ("Smallwood Appellants"), white and African-American citizens and registered voters residing in either North Carolina's First or Twelfth Congressional District, were granted leave by this Court to intervene as Appellants from the final judgment of the three-judge United States District Court for the Eastern District of North Carolina, entered April 6, 1998, in *Cromartie v. Hunt*. The *Cromartie* three-judge court held that the Twelfth Congressional District of North Carolina's 1997 congressional reapportionment plan, 1997 N.C. Sess. Laws., Ch. 11 ("1997 Remedial Plan"), violates the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The April 14, 1998 opinion of the three-judge district court appears in the Appendix to the Jurisdictional Statement on Behalf of the State of North Carolina ("NC. J.S. App.") at 1a. The district court's order and permanent injunction, entered on April 3, 1998, and the district court's final judgment, entered April 6, 1998, are unreported and appear at NC. J.S. App. at 45a and NC. J.S. App. at 49a, respectively. Previous decisions of earlier phases of related litigation are reported at *Shaw v. Hunt*, 517 U.S. 899 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994); and *Shaw v. Reno*, 808 F. Supp. 461 (E.D.N.C. 1992).

JURISDICTION

The judgment of the court below was entered on April 6, 1998. The State of North Carolina filed an amended notice of appeal to this Court on April 8, 1998. This Court noted probable jurisdiction on September 29, 1998. The jurisdiction

of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Rule 56 of the Federal Rules of Civil Procedure, reproduced at NC. J.S. App. at 169a and 171a, respectively.

STATEMENT OF THE CASE

A. Events leading to Adoption of the 1997 Remedial Plan

This case is a challenge to the 1997 Remedial Plan, which is the third congressional redistricting plan enacted by the North Carolina General Assembly since the 1990 Census.[1]

On remand, the North Carolina General Assembly convened to develop a redistricting plan to remedy the constitutional infirmities found by this Court. While the State has identified many factors, especially political concerns, that were considered by the General Assembly, the legislature also had before it an extensive record concerning the historical exclusion of black voters, continuing racial appeals in North Carolina election contests, the socio-economic disparities affecting African-American voters' opportunities to participate in the political process, the lack of success of African-American

[1]This Court's ruling in *Shaw v. Hunt*, 517 U.S. 899 (1996), concerned the 1992 Congressional Redistricting Plan ("1992 Plan") enacted by the North Carolina legislature following the 1990 Census. In *Shaw*, this Court held that the 1992 Plan was unconstitutional because the location and configuration of District 12 violated the equal protection rights of some of the plaintiffs in the action. *Shaw*, 517 U.S. at 902. A map of the 1992 Plan is reproduced at NC. J.S. App. at 61a.

candidates, and the continuing prevalence of racially polarized voting. *See, e.g.*, Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997 at 19-22; *Id.*, Ex. 6 (Statement of Anita Hodgkiss) at 2-7; *Id.*, Ex. 6, Tab 2 (Expert Report of Dr. Richard Engstrom) ("Engstrom Report").

Indeed, the General Assembly was aware that for nine decades, from 1901 until 1992, no African-American candidate had been elected to Congress in North Carolina, even when they enjoyed the overwhelming support of African-American voters. Moreover, African-American voters were disenfranchised as a result of conscious, deliberate and calculated state laws that both denied African-American voters access to the ballot box and effectively diluted their votes. *See Gingles v. Edmisten*, 590 F. Supp. 345, 359 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986). The State utilized measures such as poll taxes, literacy tests, anti-single shot voting laws, and at-large and multi-member election districts to exclude African-Americans from the political process. *Id. See also* Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997 at 19-22; *Id.*, Ex. 6, Tab 17 (Expert Report of Dr. J. Morgan Kousser) ("Kousser Report"); Affidavit of Dr. David R. Goldfield ("Goldfield Report"), filed as Tab 3 to Defendants' Brief in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Their Cross-Motion for Summary Judgment. Specifically, with regard to congressional districting, in its 1970 and 1980 reapportionment plans, the General Assembly intentionally fragmented the African-American vote in the

northeastern portion of the state to make sure African-American voters could not garner enough support to elect their preferred candidate to Congress. Kousser Report at 34-46. Also, racial appeals in campaigns were used by white candidates to dissuade white voters from supporting African-American candidates. Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997, Ex. 6, Tab 17 (Expert Report of Dr. Harry L. Watson).

To this day, the ability of African-American voters to participate in congressional elections has continued to be hindered by the persistent effects of past official discrimination. For example, the legacy of literacy tests, in use until the mid-1970's, and poll taxes continues to be reflected in the fact that African-American voters are registered to vote in lower percentages than white voters.[2] African-American voters as a whole are less well-educated, lower-paid, more likely to be in poverty, and have less access to basic instruments of political participation such as telephones, cars, and money than do their white counterparts, which adversely affects their ability to participate effectively in the political process. Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing

[2]In 1960, statewide only 39.1 percent of the African-American voting- age population was registered to vote, compared to 92.1 percent of the white voting-age population. *Gingles v. Edmisten*, 590 F. Supp. at 360. In the majority-black counties, all located in eastern North Carolina, less than 20 percent of the African-American population was registered to vote in 1960. Goldfield Report at 5. By 1980, statewide 51.3 percent of age-qualified blacks and 70.1 percent of whites were registered. *Gingles*, 590 F. Supp. at 360. In 1993, 61.3 percent of blacks and 72.5 percent of whites who were eligible to vote were registered. Stipulation No. 63.

Transcript, February 26, 1997, Ex. 6, Tab 17 (*Shaw v. Hunt*, Defendant-Intervenor Stipulations) ("Stipulations") Nos. 1-58, 64-67).

Elections in North Carolina in the 1990's are still marked by direct appeals to race designed to discourage white voters from voting for African-American candidates. Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997, Ex. 6, Tab 17 (Expert Report of Dr. Alex Willingham) at 17-26. In fact, in 1990, large numbers of qualified African-American voters were anonymously sent post cards which misrepresented state law and threatened them with criminal prosecution if they tried to vote after having recently moved. Affidavit of Gary O. Bartlett, Section 5 Submission, Attachment 97C-28F-3B, North Carolina Congressional Redistricting Public Hearing Transcript, February 26, 1997, Ex. 6, Tab 16 (*Shaw v. Hunt* Defendant-Intervenor Ex. 522-531).

In North Carolina elections, white voters tend not to support the candidates of choice of African-American voters. In this century, no African-American candidate other than Ralph Campbell, State Auditor, has ever won a statewide election contest for a non-judicial office. No single-member majority-white state legislative district has ever elected an African-American candidate to the state legislature. Stipulation Nos. 13, 18. A study of 50 recent elections in which voters have been presented with a choice between African-American and white candidates, including congressional elections, statewide elections and state legislative elections, found that 49 of the 50 were characterized by racially polarized voting. *See* Engstrom Report. In every statewide election since 1988 where voters

were presented with a biracial field of candidates, voting patterns indicated significant white-bloc voting. *Id.* In all except two low-profile contests, racially polarized voting was sufficient to defeat the candidate chosen by African-American voters. *Id.*

A pattern of racially polarized voting continued in the 1996 U.S. Senate campaign between Harvey Gantt and Jesse Helms. The regression and homogeneous precinct analyses show that statewide, Gantt received between 97.9 percent and 100 percent of the African-American vote, but only 35.7 percent to 38.1 percent of the non-African-American vote. *See* Affidavit of Gary O. Bartlett, Section 5 Submission at Attachments 97C-28F-3B and 97C-28F-D(3), p.6.

B. The 1997 Remedial Plan

The first post-1990 Census North Carolina congressional reapportionment plan, enacted in 1991, contained one majority-black district that was 55.69 percent black in total population and 52.18 percent black in voting age population.[3] The second post-1990 Census reapportionment plan, enacted in 1992, contained two majority-black districts (the First and Twelfth Congressional Districts), but the Twelfth Congressional District was held unconstitutional in *Shaw v. Hunt*.

The North Carolina General Assembly enacted the 1997 Remedial Plan to remedy the constitutional violation found in *Shaw v. Hunt*. District 12 in the 1997 Remedial Plan is no longer a majority-black district. In fact, by every measure, the African-American population in District 12 is approximately ten

[3]This Court discussed the history of the first plan in *Shaw* v. *Reno*, 509 U.S. 630 (1993) and *Shaw v. Hunt*, 517 U.S. 899 (1996).

percentage points lower than it was in the 1992 Plan:

Population	1992 Dist. 12	**1997 Dist. 12**
Total Black	56.63%	**46.67%**
Total White	41.80%	**51.59%**
Voting Age Black	53.34%	**43.36%**
Voting Age White	45.21%	**55.05%**

Jt. App. at 111 - 115.

In 1997, the General Assembly had two primary redistricting goals. The first was to remedy constitutional defects found by this Court in the 1992 Plan, including the predominance of racial considerations underlying the shape and location of District 12. NC. J.S. App. at 63a. The General Assembly accomplished this goal by utilizing a variety of different redistricting techniques (including several that were not used in 1992), *id.*, including:

1. Avoiding any division of precincts and of counties to the extent possible;

2. Avoiding use of narrow corridors to connect concentrations of minority voters;

3. Striving for geographical compactness without use of artificial devices such as double cross-overs or point contiguity;

4. Pursuing functional compactness by grouping together citizens with similar interests and needs; and

5. Seeking to create districts that provide easy communication among voters and their representatives.

The second primary goal was to preserve the even (six Republican and six Democratic members) partisan balance in North Carolina's then-existing congressional delegation, which reflected the existing balance between Democrats and Republicans in the State. *Id.* at 64a. In addition, with the State House of Representatives controlled by Republicans and the State Senate controlled by Democrats, preserving the same partisan balance in the congressional delegation was essential to ensure that the General Assembly would be able to agree on a remedial plan. Preserving the political status quo in the congressional delegation was necessary to avoid dissension from either party, *see id.*, and, therefore, an entirely new configuration would not have been politically acceptable. However, the General Assembly felt, as a matter of policy, that the legislature, rather than the *Shaw* district court, had a constitutional duty to devise a new remedial plan, conducting the necessary balancing of the various interests necessary in redistricting. *See id.*

During the 1997 redistricting process, the General Assembly considered, but ultimately rejected, proposed plans that would have created a second majority-minority district in the area east of Charlotte toward Cumberland and Robeson Counties. Several groups and individuals, including the North

Carolina Association of Black Lawyers and State Representative Mickey Michaux, objected to the 1997 Remedial Plan because, in their view, it diluted the voting strength of African-Americans in certain areas of the state and "deliberately separates large politically cohesive African-American communities." *See Shaw v. Hunt,* No. 92-202-CIV-5, Memorandum in Support of Motion to Intervene (E.D.N.C. filed April 15, 1997). The plan favored by these groups was designed to avoid dilution; it also would have combined African-American voters in Charlotte with voters, including African-American and Native American voters, in rural areas southeast of Charlotte. The General Assembly concluded that such a district would have combined urban and rural voters with disparate and divergent economic, social and cultural interests and needs. NC. J.S. App. at 66a. Also, the proposed district lacked a natural means of communication and access among its residents. In addition, that district would have thwarted the goal of maintaining partisan balance in the State's congressional delegation. *Id.* Although this plan was not enacted, the State has recognized the need to preserve an equal opportunity for African-American voters to elect their candidates of choice in District 12. *See* NC. J.S. App. at 66a.

The General Assembly enacted the 1997 Remedial Plan on March 31, 1997 and submitted it to the three-judge court in *Shaw v. Hunt,* No. 92-202-CIV-5-BR (E.D.N.C.) the following day. The State also submitted the plan for preclearance by the United States Department of Justice pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. On June 9, 1997, the Department of Justice precleared the plan. *See* NC. J.S. App. at 162a (*Shaw v. Hunt,* No. 92-202-CIV-5-BR, Memorandum Opinion (E.D.N.C. September 12, 1997)).

On September 12,1997, the three-judge district court in *Shaw v. Hunt* unanimously approved the 1997 Remedial Plan as "a constitutionally adequate remedy for the specific violation found by the Supreme Court in [*Shaw v. Hunt*]." NC. J.S. App. at 167a. A map of the 1997 Remedial Plan is reproduced at NC. J.S. App. at 59a.

C. The Legal Challenge to the 1997 Remedial Plan

On July 3, 1996, following the decision of this Court in *Shaw v. Hunt*, three residents of Tarboro, North Carolina, Appellees herein, filed the complaint in this action (*Cromartie v. Hunt*), challenging District 1 in North Carolina's 1992 Plan on the ground that it violated their equal protection rights because race predominated in the drawing of the district. A stay was entered pending the resolution of the remand proceedings in *Shaw v. Hunt*. On July 9, 1996 the same Tarboro residents joined the original plaintiffs in *Shaw* in filing an Amended Complaint in *Shaw*, raising a similar challenge to and asserting the same claims against the First Congressional District as they raised in *Cromartie v. Hunt*. On July 11, 1996, the members of the Smallwood Appellant group (three voters from the First District and six voters from the Twelfth District) sought to intervene in the *Cromartie* suit as defendants.[4]

The *Shaw* case was dismissed by the three-judge court on September 12, 1997, and the *Cromartie* three-judge court lifted its stay of proceedings on October 17, 1997. On the same day, two of the three original plaintiffs, along with four residents of District 12, filed an amended complaint in the

[4]The Smallwood Appellants participated fully as intervenors in *Shaw v. Hunt* in the trial court and in this Court, including in the remedial proceedings which resulted in the approval of the 1997 Remedy Plan.

Cromartie action, challenging the 1997 Remedial Plan as a violation of the Equal Protection Clause and still seeking a declaration that District 1 in the 1992 Plan is unconstitutional.[5] Within the time allowed for answering that amended complaint, the Smallwood Appellants filed a renewed motion to intervene as defendants.

On March 31, 1998, the court below heard arguments on cross-motions for summary judgment and on the *Cromartie* plaintiffs' request for preliminary injunction. At the time of this hearing, the district court had not ruled on the motions to intervene of the Smallwood Appellants which had then been pending for over twenty months and four months, respectively. The court issued its permanent injunction and granted summary judgment without ruling on these unopposed motions or holding a hearing on intervention. In fact, the district court refused to allow counsel for the Smallwood Appellants an opportunity to bring the motion to intervene before it and expressly denied counsel for the Smallwood Appellants an opportunity to speak at the hearing.

In their summary judgment papers and at the hearing, Appellees contended that the 1997 Remedial Plan should be declared unconstitutional because it is the "fruit of the poisonous tree" of the redistricting plan held to be unconstitutional in *Shaw v. Hunt*. *See, e.g.*, Plaintiffs' Brief in Support of Motion for Preliminary Injunction at 4-5. Analogizing the 1997 redistricting process to a criminal trial in which evidence discovered as a result of information gained by

[5]While Appellees Cromartie and Muse were also plaintiffs in *Shaw v. Hunt*, they chose not to present their claims that the 1997 Remedial Plan was unconstitutional to the *Shaw* three-judge court.

an illegal search is admitted, Appellees argued that any remedial plan drawn by the legislature must be held unconstitutional unless the legislature completely discards the invalidated plan and develops its new plan without reference to even the lawful aspects of the prior plan. *Id.*

On April 3, 1998, a three-judge United States District Court for the Eastern District of North Carolina issued an order granting summary judgment to plaintiffs, declaring North Carolina's Twelfth Congressional District unconstitutional, permanently enjoining elections under the 1997 Remedial Plan, and ordering the State of North Carolina to submit a schedule for the General Assembly to adopt a new redistricting plan and to hold elections under that plan. NC. J.S. App. at 45a. The district court issued its judgment on April 6, 1998. NC. J.S. App. at 49a. Neither the order nor the judgment was accompanied by a memorandum opinion from the court.

Although the court had not yet released an opinion, the State moved for a stay of the injunction pending appeal. The district court denied this motion. The State then filed an application with this Court for a stay pending appeal, and the Smallwood Appellants filed an *amicus curiae* memorandum in this Court in support of the application. This Court denied the request for a stay on April 13, 1998, with Justices Stevens, Ginsburg, and Breyer dissenting.

On April 14, 1998, the district court issued its opinion explaining its April 3, 1998 order. The court accepted the uncontested affidavit testimony of Senator Roy A. Cooper, III that the legislature "aimed to identify a plan which would cure the constitutional defects and receive the support of a majority of the members of the General Assembly." NC. J.S. App. at 5a. The court also accepted the uncontroverted affidavit testimony

of Senator Cooper and Gary O. Bartlett, Executive Secretary-Director, State Board of Elections, that "[i]n forming a workable plan, the committees were guided by two avowed goals: (1) curing the constitutional defects of the 1992 plan by assuring that race was not the predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation." *Id.*

The court below found that the 1997 Remedial Plan met the goal of maintaining the existing partisan balances by "avoid[ing] placing two incumbents in the same district" and "preserv[ing] the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan." *Id.* at 5a-6a. Further, the court received no evidence that directly contradicted the testimony introduced by the State to the effect that the legislature sought, in creating the 1997 Remedial Plan, to cure the constitutional defects found by this Court by ensuring that race did not predominate in its creation while minimizing partisan and political disruption. *See id.* at 63a-64a. Nevertheless, the court below found that race was the predominant factor in the creation of the 1997 Remedial Plan based upon its own assessment of (a) District 12's racial demographics and shape, (b) the racial characteristics of a limited number of precincts that were included in or excluded from the district, and (c) mathematical measures of District 12's relative compactness. *Id.* at 6a-11a.

While the court asserted that "[a] comparison of the 1992 District 12 and the present District is of limited value here," *id.* at 19a, it concluded that District 12 in the 1997 Remedial Plan is as "unusually shaped" as was District 12 in the 1992 Plan. *Id.* Focusing exclusively on demographic data and the district's configuration, the court held that "the General

Assembly, in redistricting, used criteria with respect to District 12 that are facially race driven." *Id.* at 21a. Finally, despite extensive conflicting factual evidence, the court below concluded that "[t]he legislature disregarded traditional districting criteria such as contiguity, geographical integrity, community of interest, and compactness in drawing District 12 in North Carolina's 1997 plan." *Id.* at 21a-22a.

The court never proceeded to assess whether District 12 was narrowly tailored to satisfy a compelling justification, even though such inquiry is necessary upon a finding that strict scrutiny should apply to the redistricting plan.[6] Instead, the court concluded that the predominance of race in the creation of the district alone proved fatal to the district: "the General Assembly utilized race as the predominant factor in drawing the District, *thus* violating the rights to equal protection guaranteed in the Constitution to the citizens of District 12." *Id.* at 22a (emphasis added). Consequently, the court granted Appellees summary judgment as to District 12.

On May 26, 1998, with their two prior unopposed intervention motions still pending, the Smallwood Appellants

---

[6]Therefore, the court never considered or discussed whether the creation of District 12 could be justified by the State's compelling interest in remedying the current effects of North Carolina's long history of political exclusion and in avoiding dilution of minority voting strength. The court ignored evidence presented by the State that its "primary goals [of remedying the constitutional defects found in the 1992 Plan and preserving partisan balances in the congressional delegation] were accomplished while still providing minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12)," NC. J.S. App. at 64a, and that "[d]istrict 12 in the State's plan also provides the candidate of choice of African-American citizens a fair opportunity to win election." *Id.* at 66a.

filed a third motion to intervene as defendants in the case. On June 20, 1998, after the deadline for filing a timely notice of appeal of the district court's April 3, 1998 order and April 6, 1998 judgment, the district court ruled that the Smallwood Appellants were entitled to intervene as of right in this action. As the delay in granting the motions to intervene prevented them from fully participating as parties in the district court and prevented them from being able to exercise their right to appeal, the Smallwood Appellants filed in this Court on October 2, 1998 a motion to intervene as Appellants in this case. This Court granted the motion on October 19, 1998.

SUMMARY OF ARGUMENT

In holding that District 12 of the 1997 North Carolina Congressional Redistricting Plan ("1997 Remedial Plan") is unconstitutional, the court below erred in several critical respects. First, the court erred in resolving this case in favor of Appellees on their motion for summary judgment. The jurisprudence developed by this Court after *Shaw v. Reno* dictates that, in evaluating whether a redistricting plan violates the strictures of the Fourteenth Amendment, a court must engage in a searching evaluation into the intent of the legislature in creating the plan. This inquiry is fact-intensive and, as such, is particularly inappropriate for resolution through summary judgment. In this case, the State of North Carolina introduced substantial documentary and testimonial (affidavit) evidence to rebut the Appellees' allegation that race predominated in the legislative redistricting process. Without hearing any live witnesses or explicitly resolving the conflicts over material facts created by the parties' submissions, the court below granted summary judgment to the Appellees, thus committing reversible error.

Second, the court below erred in holding that race was the predominant factor in the creation of the Twelfth Congressional District. Appellees argued below that the 1997 Remedial Plan must be declared unconstitutional because it was the "fruit of the poisonous tree" (the plan invalidated by *Shaw v. Hunt*). In essence, Appellees assert that a State remedying a *Shaw* violation is required to do significantly more than correct the constitutional defect found in a challenged district. According to Appellees, the State must abandon every feature of the challenged plan and construct a new plan without regard to traditional districting concerns such as the partisan political makeup of the State's congressional delegation, incumbent protection, and avoiding unnecessary disruption of communities of interest. Appellees' theory is fundamentally at odds with this Court's precedents, finding no support in *Shaw* or its progeny or in the case law defining how courts evaluate remedial redistricting plans.

The lower court in effect endorsed this theory, according no deference to the State's policy choices in the redistricting process. This also was error. To the extent that the 1997 Remedial Plan did not violate any federal or state constitutional or statutory requirements, the district court was bound to approve the legislature's decisions.

The court further erred in holding the 1997 Remedial Plan unconstitutional based solely on its finding that race was one factor among many considered by the legislature in redistricting. In so ruling, the court failed to give any weight to the State's obligation to avoid minority vote dilution in redistricting, which necessarily meant that the legislature would have to be conscious of race in shaping the plan. This ruling is inconsistent with the Court's decisions in *Shaw* and its progeny

that require plaintiffs to show that race *predominated* in the redistricting process and *subordinated* traditional redistricting principles. Thus, the court's determination that the mere awareness of race in the redistricting process rendered the 1997 Remedial Plan unconstitutional is erroneous and must be reversed.

Third, even if the district court had correctly found that race was the predominant factor in the creation of the Twelfth District, it erred by not engaging in the required strict scrutiny analysis to determine if the State had a compelling justification and narrowly tailored the district to achieve that purpose

ARGUMENT

I. Summary Judgment was Inappropriate in this Case

A. Because this case involves an inquiry into the intent of the North Carolina legislature, it should not have been resolved through summary judgment

Under this Court's decisions, the "analytically distinct" claim recognized in *Shaw v. Reno*, 509 U.S. 630 (1993) requires a particularly fact-intensive inquiry and is therefore ill-suited to determination by summary judgment. Many factors influence the redistricting process, but only the predominance of one factor -- race -- will trigger strict scrutiny. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995). Accordingly, a "searching inquiry is necessary before strict scrutiny can be found applicable." *Bush v. Vera*, 517 U.S. 952, 958 (1996).

In particular, resolution of this case will involve an inquiry into the intent of the North Carolina legislature through an examination of the motivation of legislators and an inquiry

into the justifications for creating the challenged districting plan. The ultimate conclusion about the predominance or non-predominance of race in the districting process is, as in other cases of intentional discrimination, purely factual. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982). But because the crucial facts at issue involve intent, they are rarely appropriate for determination on summary judgment. *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) ("We believe that summary procedures should be used sparingly in complex antitrust litigation where motivation and intent play leading roles, the proof is largely in the hands of alleged conspirators, and hostile witnesses thicken the plot").[7]

The lower federal courts have found summary judgment procedures particularly inappropriate in cases where intent is a critical issue and have made sparing use of the remedy. *E.g.*, *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 895 (1st Cir. 1988) (*citing Poller*). *See Stepanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 928 (1st Cir. 1983); *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074, 1087 (3d Cir. 1981), *cert. denied*, 458 U.S. 1152 (1982). *See also Smith v. University of North Carolina*, 632 F.2d 316, 338 (4th Cir. 1980) (lower court did not err in denying motion for summary judgment where genuine issue of material fact existed regarding the reasons underlying

[7]To be sure, such cases may still be resolved on summary judgment where the party opposing summary disposition fails to "offer[] any concrete evidence from which a [factfinder] could return a [judgment] in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (distinguishing *Poller*). As we discuss below, however, that was not at all the situation in the instant matter. The State of North Carolina introduced substantial evidence that would support a judgment in its favor and was certainly sufficient to prevent entry of summary judgment for Appellees.

the defendant's decision not to appoint or promote the plaintiff). Courts have noted that when the disputed issues concern intent or motivation, judgments about the credibility of witnesses by the finder of fact are of special importance and utility. *See, e.g.*, *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). Consequently, the need for a court to engage in the difficult process of assessing the motivation, state of mind, and credibility of a decision maker is, by itself, a sufficient basis for denying summary judgment. *See* 10B Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2730 (1998 ed.).

Attempting to determine the role that race played in the redistricting process is a necessarily fact-intensive inquiry, requiring a court to engage in an exhaustive review of the legislative process. *See Bush v. Vera*, 517 U.S. at 959 (in "mixed motive" cases, "careful review" is necessary to determine application of strict scrutiny to electoral districts). Resolving the difficult question of legislative intent requires a review of direct evidence, such as the statements and testimony of legislators, as well as circumstantial evidence, such as district shape and demographics.

These principles are reflected in the post-*Shaw* jurisprudence. In every case where a court has struck down a district pursuant to *Shaw*, it has relied on evidence, gained after a thorough review of the redistricting process, that race was the predominant factor in districting. For example, in *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995), the district court determined that race was the legislature's dominant consideration in districting only after engaging in a detailed review of Georgia's submissions to the Department of Justice in the preclearance process under Section

5 of the Voting Rights Act. Recognizing that legislative redistricting is the end result of balancing many factors, 864 F. Supp. at 1363, the court conducted an exhaustive review of committee meetings and debates, *id.* at 1363-68, competing proposals considered by the legislature, *id.* at 1363, the extent and type of computer assistance utilized during the redistricting process, *id.* at 1363 n.2, advocacy positions adopted by individual legislators, *id.* at 1363, Section 5 submission materials, *id.* at 1376, and legislative reaction to the denial of preclearance, *id.* at 1363-66. The court reviewed documentary evidence on each of these subjects and also heard direct testimony from those involved with the legislative process in order to put that evidence in its proper context.

The district court in *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996), also premised its determination that race predominated on a thorough review of the intricacies of the challenged redistricting process. The court reviewed transcripts of and testimony about the legislature's floor debates and regional outreach hearings, *id.* at 1313-14, Section 5 submissions, *id.* at 1315, alternative redistricting plans considered during the legislative process, *id.* at 1330-31, newspaper articles published before and during the redistricting process, *id.* at 1319, and the use of racial data in the drawing of boundary lines, *id.* at 1318-19. Moreover, the court looked beyond the bounds of the challenge at issue to review testimony of legislators in previous litigation regarding the same redistricting process. *Id.* at 1319-21, 1324. As a result, the court was able to ferret out inconsistencies and conclude that "the testimony submitted in this racial gerrymandering case is at first glance starkly at odds with the explanation for the district's

severely contorted boundaries offered in [the previous litigation]." *Id.* at 1321.

In *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), the district court conducted a similar review of the entire legislative process before determining that race dominated the redistricting experience, including a review of statements and evidence presented in related litigation and testimony before legislative committees. *See, e.g., id.*, 946 F. Supp. at 1178-87. In making this thorough review, the court took note of the lack of legislative "hearings or evidence or findings as to" compliance with traditional redistricting factors and compliance with Section 2 of the Voting Rights Act, concluding that these omissions were evidence that race was the predominant factor. *Id.* at 1192-93.

Courts have not reviewed the statements and actions of legislators in a vacuum, nor have they focused solely on legislators' or observers' statements regarding the role of race in the redistricting process. Rather, consistent with this Court's *Shaw* jurisprudence, they have also examined the influence of "traditional" redistricting factors and alternative justifications for district configurations. *See, e.g., Bush v. Vera*, 517 U.S. at 959 (discussing significance of traditional districting principles). In determining the extent to which traditional districting factors have played a role, courts have looked to demographic data, the shape of the challenged districts, the legislature's use of racial data, the legislature's consideration and protection of communities of interest, protection of incumbent interests, and the history of discrimination in the jurisdiction. *See, e.g., Vera*, 861 F. Supp. at 1311 (review of racial demographics and comparison of 1980 and 1990 census); *id.* at 1309 (examining availability of racial data relative to

availability of data on other districting factors); *Miller*, 864 F. Supp. at 1375-76 (reviewing substantial evidence received from expert witnesses, religious leaders, community activists, and legislators regarding communities of interest); *Vera*, 861 F. Supp. at 1322 (same); *Vera*, 861 F. Supp. at 1312, 1317 (extensive review of incumbency interests including historical accommodations, alternative incumbent-sponsored plans, negotiations, and maps). It is only after finding that the evidence "advertises 'disregard' for these considerations in favor of race-based line drawing," that a court can safely conclude that race was the predominant factor affecting a given districting plan. *Miller*, 864 F. Supp. at 1369.

No such intensive factual inquiry was conducted by the court below, despite substantial conflicting evidence on the key issues of purpose and intent submitted by the parties, which should have occasioned an evidentiary hearing. Instead, and contrary to the decisional principles announced and applied in the cases discussed above, the court ignored all factual complexities, disregarded state legislators' sworn affidavits without hearing their testimony and judging their credibility, and granted summary judgment to plaintiffs. Unlike the courts discussed above, each of which weighed a substantial body of evidence and considered the multiplicity of factors relevant to a legislature's redistricting efforts, the court below reached its conclusion merely by reviewing the configuration of the challenged district and examining statistics about a few of the more than 150 precincts included within it -- then ruling summarily in favor of the Appellees. That error warrants reversal of its judgment.

B. Because this case necessarily concerns issues arising under the Voting Rights Act, it should not have been resolved through summary judgment

Evidence was presented in this case that the configuration of the 1997 Remedial Plan was justified by the State's need to comply with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, so as to ensure that minority voting strength was not diluted during the redistricting process. In order to determine if compliance with the Act is a compelling justification for a particular plan in a particular jurisdiction, a district court would be required to examine the evidence relating to proving a vote dilution claim under Section 2. This inquiry is also not well suited for summary adjudication.

In assessing whether a given plan dilutes minority voting strength, this Court requires trial courts to engage in "a searching practical evaluation of the past and present reality" based on a "functional view of the political process." *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (internal citation and quotation omitted). The Court has instructed that this inquiry should include an examination of the history of political discrimination in the jurisdiction, the extent of racially polarized voting, and the extent to which minorities have been elected to political office. *Id.* at 44-45. This inquiry is fact-intensive and, given the depth of the analysis required, courts are reluctant to grant summary judgment in cases involving Section 2, preferring instead to evaluate disputes over the three *Gingles* preconditions, and conclusions based upon the totality of the circumstances, after a trial. *See, e.g., Jeffers v. Clinton*, 839 F. Supp. 612, 616 (E.D. Ark. 1993) (denying summary judgment in Section 2 case where material issues remained unresolved

since "information needed to determine district lines and population percentages" in hypothetical plan offered by plaintiffs to establish first *Gingles* precondition was disputed by the parties); *Johnson v. DeSoto County Board of Commissioners*, 868 F. Supp. 1376, 1382 (M.D. Fla. 1994) (summary judgment denied because "under the totality of the circumstances, Plaintiffs' ability to meet the third necessary condition is a genuinely disputed material issue of fact which precludes summary judgment"), *rev'd on other grounds*, 72 F.3d 1556 (11th Cir. 1996); *Mallory v. Eyrich*, 707 F. Supp. 947, 954 (S.D. Ohio 1994) (denial of summary judgment to permit full development of record in order to determine the proper interpretation of the facts and to resolve disputed expert analysis). Indeed, the district court in *Johnson v. DeSoto County Board of Commissioners* held that "[t]he degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will vary according to a variety of factual circumstances." 868 F. Supp. at 1382 (citing *Gingles*, 478 U.S. at 57-58). In denying the motion for summary judgment in the *DeSoto* case, the court noted that under the totality of the circumstances, determining minority voters' ability to participate equally in the political process necessarily requires "an intense local appraisal of the design and impact" of the disputed electoral schemes. *Id.* (citing *Gingles*, 478 U.S. at 79).

In deciding cases brought under the *Shaw* regime, district courts typically inquire and draw conclusions regarding the role of Voting Rights Act considerations in the redistricting process only after a trial on the merits. For example, in *Vera*, the district court acknowledged that "the Legislature embarked upon Congressional redistricting against the legal backdrop of the Voting Rights Act," 861 F. Supp. at 1314, and proceeded

to examine factors typically at issue in voting rights litigation. Relying on testimony before the legislature on the requirements of the Voting Rights Act and the narrative included with the State's Section 5 submissions, the court sought to ascertain the legislature's interpretation of the requirements of the Voting Rights Act. *Id.* at 1315-16. The court's review also included consideration of Texas' "well-documented history of discrimination" in the electoral process, as well as extensive, yet conflicting, evidence from social scientists, community activists, and legislators regarding racial polarization in Texas and the existence of coalition voting between African-American and Hispanic voters, as well as white bloc voting. *Id.* at 1315-17.

Similarly, in *Smith v. Beasley*, the court sought to determine the role the Voting Rights Act played in the South Carolina redistricting process through a review of the redistricting subcommittee's guidelines for addressing the requirements of Sections 2 and 5 of the Voting Rights Act, and evidence establishing that "in South Carolina, voting has been, and still is, polarized by race." 946 F. Supp. at 1179, 1202.

The district court in this case never engaged in the level of analysis necessary to evaluate whether the creation of the 1997 Remedial Plan was justified in light of the State's responsibilities under the Voting Rights Act. Indeed, if the district court had timely recognized the Smallwood Appellants' right to intervene before ruling, they would have occupied a role similar to the one assumed by the defendant-intervenors in *Shaw v. Hunt*,[8] introducing evidence and presenting arguments concerning the State's responsibilities under the Voting Rights Act. For example, as parties, the Smallwood Appellants would

---

[8] *See supra* note 4.

have presented evidence regarding the history of political exclusion of the State's African-American population and would have argued that the State was required to consider this history, and take particular care not to dilute minority voting strength, in fashioning a remedy for the constitutional violation found by this Court. Also, the Smallwood Appellants could have introduced evidence showing that the Appellees' proposed plans might be vulnerable to an attack under Section 2 of the Voting Rights Act.

Because *Shaw* cases often involve issues arising under the Voting Rights Act, they require full development of the underlying facts for proper resolution, which will ordinarily necessitate evidentiary hearings. *See County Council v. United States*, 555 F. Supp. 694, 706 (D.D.C. 1983) (resolution of issues raised by violations of Section 5 and Section 2 of the Voting Rights Act "depends on facts which should be developed at trial"); *City of Rome v. United States*, 450 F. Supp. 378, 384 (D.D.C. 1978) (determination of issues raised by the Voting Rights Act should be resolved after a full opportunity for discovery). For this reason, the grant of summary judgment below was erroneous.

II. The District Court Erred in Ruling that Race Was the Predominant Factor in the Creation of the Twelfth Congressional District

A. The court erred in sanctioning the Appellees' argument that race predominated in the development of the 1997 Remedial Plan because that plan did not evidence the legislature's complete abandonment of the 1992 Plan as a starting point for fashioning the remedy.

The Appellees proposed below, and the district court tacitly approved, a requirement that the State abandon the previously challenged plan in its entirety and develop a remedial plan without reference to any of the features of the prior plan, including even the race-neutral redistricting principles the State chose to recognize in fashioning the earlier plan. As discussed *supra* in the Statement of the Case, Appellees argued below that the 1997 Remedial Plan must be declared unconstitutional because it was the "fruit of the poisonous tree" (the plan invalidated by *Shaw v. Hunt*).

Appellees' "fruit of the poisonous tree" theory would require a state remedying a *Shaw* violation to do substantially more than correct the constitutional defect found in a challenged district; under Appellees' approach, nothing less than the complete reconstruction of the invalidated plan is an adequate remedy for the constitutional violation. This novel theory is fundamentally at odds with this Court's precedents. There is no support in the decisions of this Court for the contention that a redistricting plan drawn to remedy a constitutional violation under *Shaw* is constitutionally invalid unless the State completely discards its original plan and

abandons even the traditional, race-neutral redistricting considerations that were recognized in the original plan.

Appellees are entitled only to have the legislature devise a plan in which traditional, race-neutral redistricting principles are not needlessly subordinated to racial considerations. The "fruit of the poisonous tree" argument places the State in the untenable position of ignoring the complicated mix of factors that necessarily and legitimately influence the redistricting process, in order to cure the prior constitutional violation. This approach makes little real-world sense. The drafter of a remedial plan designed to cure a defect in one district in a prior plan must, of necessity, consider a substantial body of political, geographic, and demographic data, as well as one-person, one-vote requirements and traditional redistricting policies in the jurisdiction. Decisions about reshaping the challenged district simply cannot be made without regard to their effect on the overall plan, including their effect on prior partisan political balances. It would, therefore, be entirely realistic for a State to seek to make the fewest alterations possible to a plan, if doing so would assist in meeting its other redistricting goals.

Appellees' argument would seriously impact settlement and remedial possibilities in voting rights cases, as it would dramatically limit States' abilities to develop plans that cure statutory and Constitutional objections while also taking into consideration legitimate political interests and other race-neutral redistricting criteria.

Rather than demand that a State forsake the myriad interests that it attempted to recognize and promote in a challenged plan, this Court has consistently accorded great deference to the States' policy choices in the redistricting process and has repeatedly held that the redistricting policy

choices of the State should be set aside by a federal court only to the extent necessary to remedy a violation of federal law. *See, e.g., White v. Weiser*, 412 U.S. 783, 795 (1973) (in devising a remedy for a federal constitutional violation, a court "should follow the policies and preferences of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitutions"); *see also Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[F]ederal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements").

When a legislative body devises a remedial plan, a court must "accord great deference to legislative judgments about the exact nature and scope of the proposed remedy." *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988). *See also White v. Weiser*, 412 U.S. at 795-96 (1973); *Tallahassee Branch of NAACP v. Leon County*, 827 F.2d 1436, 1440 (11th Cir. 1987). Where, as here, the State has enacted a new plan that fully remedies the *Shaw* violation and complies with all applicable federal and state constitutional and statutory provisions, there is no basis for federal judicial interference with its implementation. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *see also Burns v. Richardson*, 384 U.S. 73, 85 (1966) ("A State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause"); *Shaw v. Hunt*, 517 U.S. at 899 n.9 ("states retain broad discretion in drawing districts to comply with the mandate of § 2") (citing *Voinovich v. Quilter*, 507 U.S. 146 (1993) and *Growe v. Emison*, 507 U.S. 25

(1993)).

Moreover, States such as North Carolina have a legitimate interest in minimizing disruption to their political process by, for example, ensuring that incumbents are protected, prior partisan balances are maintained, and districts surrounding the invalidated district(s) are preserved intact to the extent possible in a remedial plan.[9] In fact, this Court and lower courts have recognized the necessity for jurisdictions to consider these issues as they devise remedial plans and have thus accorded states broad deference in the redistricting process. *See, e.g., Lawyer v. Department of Justice*, 521 U.S. ___, 117 S. Ct. at 2192-3 (1997), *aff'g Scott v. United States*, 920 F. Supp. 1248, 1255 (M.D. Fla. 1996); *Shaw v. Hunt*, 517 U.S. at 899 n.9; *Miller v. Johnson*, 515 U.S. at 915; *Upham v. Seamon*, 456 U.S. 37, 42 (1982); *White v. Weiser*, 412 U.S. at 794-95 (1973).[10]

---

[9]Although it is undisputed that the State sought to protect all of the incumbent members of the congressional delegation and preserve the partisan balance of six Democrats and six Republicans that resulted from elections held under its original plan, Appellees have suggested that the State must exclude the Twelfth District's African-American Congressman from such protection. *See* Motion to Dismiss or, in the Alternative, to Affirm at 27. By arguing that it was *per se* unconstitutional for the State to protect the incumbency of the Twelfth District's African-American Congressman to the same extent as it protected other incumbent members of Congress, Appellees urge the adoption of a double standard that is intolerable under the decisions of this Court. *See, e.g., Miller v. Johnson*, 515 U.S. at 928 (O'Connor, J., concurring); *Shaw v. Hunt*, 517 U.S. at 996 (Kennedy, J., concurring).

[10]This is consistent with this Court's longstanding view that the governmental entity must be given the first opportunity to propose a remedial plan after a voting rights violation is found. *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981).

This Court's decision last term in *Lawyer* underscores the district court's error in adopting Appellees' "fruit of the poisonous tree" theory. Both the district court in *Scott* and this Court in *Lawyer* upheld a Florida state legislative district that was redrawn after a finding of a *Shaw* violation. This Court upheld the remedial district notwithstanding (a) its resemblance to the original plan's 21st Senate District, (b) the fact that the plan's drafters used the original 1992 redistricting plan as a starting point, and (c) the district's continued majority-minority status. Neither this Court nor the district court deemed Florida's remedial plan "tainted" simply because it used the challenged plan as its base. Moreover, neither court questioned Florida's stated, race-neutral interest in preserving electoral stability by avoiding needless disruption of the political relationships that had developed between the time of the original enactment of the challenged plan and the date that the remedial plan was devised.

If the court below had properly applied these principles, it would have rejected appellees' "fruit of the poisonous tree" argument and approved the 1997 Remedial Plan. The district court was bound to approve the legislature's remedial plan to the extent that it did not violate any federal or state constitutional or statutory requirements. The court below did not have the remedial power, and the Appellees do not have a constitutional right, to dictate the State's redistricting priorities beyond what is required to eliminate the equal protection violation this Court initially found in *Shaw v. Hunt*. This Court should therefore reverse the district court's erroneous adoption of the "fruit of the poisonous tree" theory and approve the 1997 Remedial Plan enacted by the North Carolina legislature.

B. In jurisdictions such as North Carolina, with a history of prior discrimination and minority vote dilution, and in which voting patterns remain racially polarized, districting must be sufficiently race-conscious to avoid violating Section 2 of the Voting Rights Act, but that circumstance does not establish that race "predominates" so as to trigger "strict scrutiny."

As noted *supra* in the Statement of the Case, the court below failed to assess most of the evidence presented by the parties on Appellees' motion for summary judgment. Instead, the court recited statistics concerning the racial composition and political party registration of voters in a small number of precincts placed within or without the Twelfth District by the 1997 Remedial Plan adopted by the North Carolina General Assembly. Without even addressing the other factors that state legislators took into account in the redistricting process, the court concluded from its limited factual recitation not only that the Remedial Plan was race-conscious, but also that it must be struck down.

In the circumstances of this case, this ruling amounted to a holding, contrary to this Court's repeated admonitions, that race-conscious districting is presumptively unconstitutional. Because such a rule is incapable of rational application, would eviscerate the protections against minority vote dilution provided by Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and is flatly inconsistent with this Court's *Shaw* decisions, the judgment below must be reversed.

As this Court has held, Appellees' evidentiary burden in this case is to show that "race for its own sake, and not other

districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Bush v. Vera*, 517 U.S. at 952, *quoting Miller v. Johnson*, 515 U.S. at 913, and "that other, legitimate districting principles were 'subordinated' to race." *Bush*, 517 U.S. at 958. *See generally id.* at 259-68. It is insufficient for Appellees to show, as they attempted to do here, merely that inclusion of African-American voters was one factor influencing the contours of a district in the plan adopted by the legislature – or even that the entire districting process was carried out "with consciousness of race," *Bush*, 517 U.S. at 1051. As Justice O'Connor has observed:

> States may intentionally create majority-minority districts and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected, *and* that neglect is predominantly due to the misuse of race, does strict scrutiny apply.

Bush, 517 U.S. at 993. (O'Connor, J., concurring) (emphasis in original); *see also United States v. Hays*, 515 U.S. 737, 745 (1995) ("We recognized in *Shaw*. . .that the 'legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination'") (citation omitted) (emphasis in original).

In *Shaw v. Reno*, 509 U.S. at 653, this Court held that it would be the extraordinary case in which strict scrutiny would apply. Indeed, in *Shaw*, *Miller*, and *Bush*, the district courts applied strict scrutiny only after they determined that race played a *predominant* role in the design of the districts at issue. *Miller*, 515 U.S. at 928 (O'Connor, J., concurring); *Shaw v.*

Hunt, 517 U.S. at 903; *Bush*, 517 U.S. at 952. And those determinations were not based upon mere "race consciousness." For example, in *Shaw*, a full trial on the merits developed what this Court termed sufficient "direct evidence" that the State's "overriding purpose" was to "create two congressional districts with effective black voting *majorities*" and that other considerations "came into play only after the race-based decision had been made." *Shaw*, 517 U.S. at 906 (original emphasis omitted and emphasis added). In *Miller*, the State conceded that the district at issue was the "product of a desire by the General Assembly to create a *majority black district*," *Miller*, 515 U.S. at 918 (emphasis added), and that the creation of the district would "violate all reasonable standards of compactness and contiguity." *Id.* at 919. In granting summary judgment to Appellees in this matter, the court below made no such findings.

Equally significant, the court below failed to give any consideration – much less appropriate weight – to the need of the North Carolina General Assembly, in any redistricting that it undertook, to be sufficiently "race conscious" so as to avoid diluting minority voting strength. Although the General Assembly's primary goals in enacting the 1997 Remedial Plan were to correct the prior constitutional violation found by this Court in *Shaw v. Hunt* and to preserve the congressional delegation's partisan balance, the State was also under an obligation to fulfill these objectives without diluting minority voting strength.

In *Shaw v. Hunt*, the Court assumed without argument that "§ 2 could be a compelling interest" justifying even a plan drawn *predominantly* on a racial basis, if the "[North Carolina] General Assembly believed a second majority-minority district

was needed in order not to violate § 2, and. . .the legislature at the time it acted had a strong basis in evidence to support that conclusion" when it created the 1992 plan. *Shaw*, 517 U.S. at 914.[11] *See also Miller*, 515 U.S. at 915 (race-consciousness in drawing district lines would not alone render a districting plan presumptively unconstitutional).

Similarly, in *Bush* this Court stated that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race. . . . Nor does it apply to all cases of intentional creation of majority-minority districts." 517 U.S. at 958 (citations omitted). The point is further emphasized by Justice O'Connor's separate concurrence in *Bush*, which makes clear that nothing in *Shaw* or its progeny should be interpreted as calling into question the continued importance of complying with Section 2 of the Voting Rights Act. *See id.* at 990. (O'Connor, J., concurring).

Justice O'Connor specifically concluded that States have a compelling interest in complying with Section 2 of the Voting Rights Act "as this Court has interpreted it," *id.* at 992.[12]

---

[11]The Court nonetheless held the 1992 Plan unconstitutional because, it found, District 12 in that 1992 Plan did not encompass a reasonably geographically compact minority population and, therefore, "where that district sits," "'there neither has been a wrong nor can there be a remedy.'" 517 U.S. at 916. The Court explained that "[w]here, as here, we assume avoidance of § 2 liability to be a compelling state interest, we think that the racial classification would have to realize that goal; the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored." *Shaw*, 517 U.S. at 915-16 (footnote omitted).

[12]Four other members of the Court clearly agree with Justice O'Connor that States have a compelling interest in avoiding minority vote

Justice O'Connor went on to find that Texas had a strong basis to believe that a majority-minority district should be drawn in Dallas, because voting was racially polarized and it was possible to draw a reasonably compact district with a substantial African-American population. *Id.* at 994.[13] Thus, Justice O'Connor's opinion confirms that reasonably compact majority-black districts are not inevitably subject to challenge under the "analytically distinct" constitutional claim recognized in *Shaw v. Reno*, and that States continue to have a compelling interest in complying with the Voting Rights Act. *See also Lawyer v. Department of Justice*, 521 U.S. 567 (1997) (upholding the constitutionality of a Florida state legislative districting plan that was drawn with conscious consideration of race to settle litigation challenging prior plan, creating majority-minority district that afforded minority voters opportunity to elect candidates of choice that was somewhat irregularly shaped and that split county and city boundaries); *Abrams v. Johnson*, 521 U.S. 74 (1997) (approving congressional districting plan for Georgia having majority-black district); *King v. State Board of Elections*, ___ U.S. ___, 118 S. Ct. 877 (1998) (*per curiam*) (summarily affirming district court ruling upholding the constitutionality of Illinois' Fourth Congressional District).

---

dilution and in complying with Section 2 of the Voting Rights Act notwithstanding their dissent from the decision to invalidate the challenged North Carolina and Texas plans. *See Bush*, 517 U.S. at 1003 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at 1045 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting).

[13]However, because Texas had *not* drawn a reasonably compact district, Justice O'Connor concluded that the district was subject to strict scrutiny and was not narrowly tailored to effectuate the State's compelling interest in avoiding minority vote dilution and complying with the Act. *Id.* at 994.

DeWitt v. Wilson, 856 F. Supp. 1409, 1413-14 (E.D. Cal. 1994) (intentional creation of majority-minority districts does not violate Constitution when redistricting plan "evidences a judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process"), *aff'd*, 515 U.S. 1170 (1995).[14]

Thus, even if the Twelfth Congressional District created by the 1997 Remedial Plan had been a majority-minority district – which it is not – that would not compel its invalidation. To hold otherwise in reviewing a redistricting measure from a State such as North Carolina, which has a long history of official discrimination against African Americans, including through creation of electoral plans that diluted their voting strength, *see Thornburg v. Gingles*, and in which there continues to be an evident pattern of racially polarized voting, would effectively nullify Section 2 of the Voting Rights Act. It would label any district that matched the hypothetical one described by plaintiffs in a Section 2 case to meet the first *Gingles* precondition, *see* 478 U.S. at 49, as the product of a "racial gerrymander" condemned by *Shaw*, notwithstanding this Court's repeated statements that *Thornburg* and *Shaw* can coexist so long as remedial Section 2 plans are narrowly tailored. Nothing in this

---

[14]A further understanding of the *DeWitt* decision can be gained by reviewing the decision of the California Supreme Court that created the redistricting plans challenged in *DeWitt*. *See Wilson v. Eu*, 823 P.2d 545, 563-64, 582, 583-84, 594, 1 Cal. 4th 707, 746, 776, 775, 790, 4 Cal. Rptr. 2d 379, 397-8, 416, 417-8, 428 (1992) (describing the various special efforts taken to create districts that would comply with the Voting Rights Act).

Court's decisions suggests that such a rule is correct.

Indeed, this Court's decision in *Lawyer* is directly to the contrary. *Lawyer* is the only case considered by this Court in the post-*Shaw* era that involves a legislatively drawn plan created to remedy alleged constitutional violations. There, the district court approved a settlement plan that reduced the total minority voting-age population in the challenged district from an original 55.3 percent to 51.2 percent through reconfiguration of the district to one that was characterized as still somewhat oddly shaped, albeit "less strained and irregular." *Scott v. United States*, 920 F. Supp. 1248, 1255 (M.D. Fla. 1996), *aff'd sub nom. Lawyer v. Department of Justice*, 521 U.S. 567 (1997). The most important consideration for the district court in determining whether it would approve the new boundaries was that the new plan "offers to any candidate, without regard to race, the opportunity to seek elective office and both a fair chance to win and the usual risk of defeat." 920 F. Supp. at 1256.

In affirming its judgment, this Court noted that the district is not majority-black, a factor that it said "supports the District Court's finding that the district is not a 'safe' one for black-preferred candidates, but one that 'offers to any candidate, without regard to race, the opportunity' to seek and be elected to office." *Lawyer*, 521 U.S. at ___, 117 S. Ct. at 2195 (quoting and citing *Scott*, 920 F. Supp. at 1256). Accordingly, this Court upheld the settlement, finding that race did not predominate and subordinate Florida's traditional redistricting criteria. *Id.* at 2195.

The Court of Appeals for the Fifth Circuit applied the same principles in *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996) (Higginbotham, J.). There, the unanimous panel

specifically rejected the argument made by defendants that there could be no constitutional remedy for plaintiffs' claimed Section 2 violation because creation of a district that matched one of the illustrative "*Gingles* factor one" plans would require that race predominate in the redistricting process, in violation of *Miller v. Johnson*. The Fifth Circuit recognized that this argument was the equivalent of declaring all majority-minority districts to be *per se* unconstitutional, contrary to this Court's holdings. Instead, it ruled, a race-conscious Section 2 remedial plan is acceptable if it is narrowly tailored and it "'substantially addresses'" the violation and "does not deviate substantially from a hypothetical court-drawn § 2 district for predominantly racial reasons." *Clark*, 88 F.3d at 1405 (quoting *Bush*, 517 U.S. at 994 (O'Connor, J., concurring), 996 (Kennedy, J. concurring) and citing *Shaw v. Hunt*, 517 U.S. at 997).

As in *Lawyer* and *Clark*, the 1997 Remedial Plan approved by the original district court in *Shaw v. Hunt* passes constitutional muster and should have been accepted by the court below. District 12 in that plan is significantly more compact geographically than it was in the 1992 Plan. The new District 12 contains parts of six counties, rather than ten, and it does not have any areas of only "point contiguity." In the 1992 plan, District 12's boundaries divided 48 precincts, while the 1997 Remedial Plan divides only one. The boundaries of the new District 12 were determined by partisan considerations and a desire to have an urban, Democratic district in the Piedmont region. *See* NC. J.S. App. at 72a-75a (Affidavit of Senator Roy A. Cooper, III); *Id.* at 81a-82a (Affidavit of Representative W. Edwin McMahan). District 12's African-American voting-age population was reduced from the original 53.34 percent in the 1992 plan to 43.36 percent. Jt. App. at 111 - 115. Finally, to

the extent that race was considered in fashioning the district, it did not predominate because the new district is "narrowly tailored" to address North Carolina's continuing obligation to avoid diluting minority voting strength in the course of remedying the prior constitutional wrong.

The contrary conclusion of the court below was erroneous both as a matter of fact and as a matter of law and should be reversed.

III. Even if Race Predominated in its Creation, the District Court Erred in Never Determining if the State had a Compelling Justification for Creating a Narrowly Tailored District 12

Even if, *arguendo*, the district court was correct to find that race was the predominant factor in the drawing of District 12, it was error for the court not to consider whether it was narrowly tailored to achieve a compelling governmental interest. As discussed, the district court concluded that, in drafting the 1997 Remedial Plan, the State disregarded traditional redistricting criteria and found that race was the predominant factor in the creation of District 12. But, the court never engaged in a strict scrutiny analysis, assessing whether District 12 was narrowly tailored to satisfy a compelling justification. Rather, the court determined that its finding of the predominance of racial considerations alone was sufficient to condemn District 12.

Even if a court finds that race predominated in the redistricting process, its inquiry does not end. This Court's *Shaw* jurisprudence requires that a court assess whether there was a compelling justification for a plan drawn with race as a predominant factor, and whether the plan was narrowly tailored

to serve that justification. *See, e.g., Shaw*, 517 U.S. at 914 (assuming without argument that "§ 2 could be a compelling interest"); *Miller*, 515 U.S. at 915 (race-consciousness in drawing district lines would not alone render a districting plan presumptively unconstitutional).

If the district court had engaged in this analysis, for the reasons discussed above it would have had to conclude that the 1997 Remedial Plan is justified. As discussed, the summary judgment record indicates that, in creating the plan, the legislature was aware of North Carolina's long history of official discrimination against African-Americans and their exclusion from the political process due to state and private action. Moreover, there was evidence that the State sought to "provid[e] minority voters a fair opportunity to elect representatives of their choice in at least two districts (Districts 1 and 12)," NC. J.S. App. at 64a, and that District 12 does afford African-American voters a fair chance to elect their candidate of choice. *See* NC. J.S. App. at 66a. The district court erred in not engaging in the rigorous strict scrutiny inquiry required by this Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court and enter judgment for defendants. In the alternative, this Court should vacate the judgment of the district court and remand the case for trial.

Respectfully submitted,

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
JACQUELINE A. BERRIEN
VICTOR A. BOLDEN
DEBORAH N. ARCHER
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 219-1900

ADAM STEIN
FERGUSON, STEIN, WALLAS,
ADKINS, GRESHAM &
SUMTER, P.A.
312 West Franklin Street
Chapel Hill, NC 27516
(919) 933-5300

TODD A. COX*
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 Eye Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

**Counsel of Record*

Attorneys for Appellant-Intervenors